NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

NEAL M. GOLDBERG GENERAL COUNSEL
1724 MASSACHUSETTS AVE N.W. WASHINGTON, D.C. 20036-1903
TEL: 202.775.3664 FAX: 202.775.3603

November 1, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-36 ("IP-Enabled Services")

Dear Ms. Dortch:

Previously, the National Cable & Telecommunications Association ("NCTA") submitted in the above-referenced docket a Legal Memorandum detailing the reasons why the IP video services proposed by SBC and other telephone companies are subject to Title VI of the Communications Act. That Memorandum demonstrated that IP video services proposed by those companies are Title VI-defined "cable services" and the facilities they propose to use are Title VI-defined "cable systems," making them "cable operators" subject to Title VI's regulatory scheme.

On September 14, 2005, SBC submitted a document in this docket entitled "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services." That document purported to show that the IP video services to be offered by SBC "will not be 'cable services' provided over a 'cable network' [sic] as those terms are defined in Title VI."

Today, NCTA is submitting a Response to the SBC paper which demonstrates once again that SBC's proposed IP video services will be Title VI "cable services" delivered over a Title VI "cable system."

If you have any questions about this submission, please contact the undersigned.

Sincerely,

/s/ Neal M. Goldberg

Neal M. Goldberg

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36

RESPONSE OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Neal M. Goldberg
Diane B. Burstein

Counsel for The National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

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RESPONSE OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby responds to SBC's *ex parte* filing entitled "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services."[1] SBC's *ex parte* responded to an earlier NCTA filing in this docket which demonstrated that, as a matter of law, SBC's proposed video service is subject to the requirements of Title VI of the Communications Act.[2]

I. INTRODUCTION AND SUMMARY

Much of the SBC *ex parte* filing reprises policy arguments intended to justify the award of unwarranted regulatory advantages over existing cable operators. Those claims have already been thoroughly addressed and rebutted, most recently by NCTA in its Reply Comments in the Video Competition Notice of Inquiry.[3] We confine this response to SBC's newly-articulated legal theories. Those legal theories are as flawed as SBC's policy arguments. Under existing

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1 Letter to Marlene H. Dortch, Secretary, FCC, from James C. Smith, WC Docket No. 04-36, Sept. 14, 2005.

2 "Applicability of Title VI to Telco Provision of Video Over IP," Attached to Letter from Neal M. Goldberg, NCTA, to Donna Gregg, Chief, Media Bureau, WC Docket No. 04-36, July 29, 2005 ("NCTA Legal Memorandum").

3 Reply Comments of NCTA, MB Docket No. 05-255 (filed Oct. 11, 2005). NCTA has fully explained that, contrary to SBC's arguments, obtaining local franchises will not impede SBC's entry into video; that there is no need to give SBC unfair regulatory advantages in order to boost competition in an already competitive marketplace; and that reliance on "pre-existing" rights of way as a method to end-run franchising is not supportable.

law, SBC will be a cable operator providing cable service over a cable system, and hence subject to the requirements of Title VI applicable to – and adhered to by – all providers of cable service, large and small, existing operators and new entrants.

In its filing, SBC attempts to explain why, in its view, telephone companies that distribute multichannel video programming to subscribers over wires using public rights-of-way are not subject to the Title VI regulatory regime. SBC bases its case against the need to comply with cable franchising and other obligations primarily on its announced plans to use Internet protocol ("IP") technology and switched architecture to provide multichannel video programming. As explained below, incorporating these technical and design elements – features which cable operators are deploying today or plan to deploy – into SBC's system architecture does not create a loophole that would allow SBC to ignore the Title VI requirements that apply to any other provider of multiple channels of video programming by wire.

First, SBC has purposely chosen to say almost nothing about what its service will look like because it knows that it is no different in any statutorily significant way from what traditional cable operators do and will be doing. SBC will be providing mostly traditional linear programming services in real time. As was recently noted, "[i]n the near term, SBC's video service won't look very different than plain old cable service."[4]

[4] "SBC Climbs the Video Mountain," *Special Report*: Telco IPTV, MULTICHANNEL NEWS, October 17, 2005, at 41. If and when SBC rolls out its service, "'it's not going to have all the future entertainment kind of stuff – some of which we've talked about, some of which frankly the technology is there to do...' says Microsoft TV director of marketing Ed Graczyk, whose company is supplying the software that will make SBC's video product tick." *Id.*

In this sense, the service is "hypothetical" since it hasn't been deployed and may never be.[5] The Commission faced similar circumstances in denying a recent SBC petition seeking forbearance from Title II requirements for its "IP Platform Services." Among other reasons given for denying the petition, the Commission observed that granting it might lead to other petitions "posing hypothetical questions regarding real or imagined services."[6] In that case, the Commission noted that "while [SBC's] IP networks are not imaginary or theoretical, the company has yet to roll them out to consumers."[7] The same can be said for its video plans.[8]

But, in another sense, the elements of the proposed SBC service – with its IP-based transmission, switched digital video, and interactive application elements – are not hypothetical, because those features are being deployed by cable operators today. As noted in the NCTA Legal Memorandum, cable operators are employing IP technology in their systems, deploying switched digital technology, and offering interactive operations *now*.[9] But that is yet another reason demonstrating that SBC's *proposed* service is no different – and should be subject to the same

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5 *See* Testimony of Scott Cleland, Chief Executive Officer, Precursor, Before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, October 19, 2005. ("We have been questioning SBC's commitment to video because we have not seen much hard evidence that video is a true competitive priority outside of their press releases. There has been little hard evidence that they are seriously spending or digging to fiberize for video a la Project Lightspeed.")

6 Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, 20 FCC Rcd 9361, 9365 (¶ 11 and note 27).

7 *Id.* at note 27.

8 *See* "SBC Climbs the Video Mountain," *Special Report*: Telco IPTV, MULTICHANNEL NEWS, October 17, 2005, at 41 ("The product hasn't yet been field tested with consumers.")

9 NCTA Legal Memorandum at 1, 13-14. *See e.g.*, "Who's calling? Just check the television screen," SAN ANTONIO EXPRESS-NEWS, September 29, 2005 ("Time Warner next month will flash caller ID on customers' TV screens when they get a phone call.... The on-screen caller ID concept is something San Antonio-based SBC has touted as a perk of the video-over-Internet television service it plans to launch....."); "Time Warner Boosting Capacity of Network," AUSTIN AMERICAN-STATESMAN, July 7, 2005, at C1 ("Time Warner Austin is installing new video switching technology to bolster the capacity of its Central Texas cable network."); "Inside Time Warner's SBC Trial," MULTICHANNEL NEWS, June 27, 2005, at 53 ("Time Warner Cable said it planned to roll out switched broadcast video in several markets this year, with full MSO deployments scheduled for 2006 and 2007. *See also*, note 33, *infra*.

regulatory regime – as cable operators deploying or planning to deploy the features SBC touts in its paper.

Second, SBC is wrong in arguing that Section 651 of the Communications Act does not limit telephone companies to only four entry options: common carriage, OVS, wireless or Title VI cable operations. It presents no evidence that Congress permitted any further options such as it proposes, nor could it because none exists.

Third, SBC will be providing "cable service" as defined in Title VI. SBC's relies on the fact that it proposes to use "switched" service, purportedly taking it out of the definition of "cable service." But the "switched" nature of its proposed service does not take it outside of the definition of a Title VI cable service, which includes "subscriber interaction ... required for the selection or use" of video programming. Nor does the proposed "integration" of services to be offered by SBC change the fact that it will be offering cable service as at least one of those services. Whatever else it may say, it is clear that SBC will be offering linear video programming channels to subscribers, just as cable operators do today.

Fourth, SBC will be providing a cable service over a Title VI "cable system." SBC's proposed facilities are not exempt from the definition of "cable system" on the theory that they will be used "solely to provide interactive on-demand services." SBC's service, even as proposed, will not consist *solely* of interactive on-demand service since at least some, if not most, of its programming will be "prescheduled by the programming provider."

II. SBC WILL BE PROVIDING "CABLE SERVICE" OVER A "CABLE SYSTEM"

A. Congress Opened the Way for Telco Entry into Video and Delineated its Regulation in Section 651

NCTA's July 29, 2005, filing detailed the four ways Congress specifically envisioned for phone companies to enter the video business. SBC now argues that these provisions were not intended to be the exclusive means for regulating video programming provided by a telephone company. It argues that it can be a multichannel video programming distributor ("MVPD") subject only to those parts of Title VI that apply to MVPDs *other* than cable operators.

But there is no such loophole. A subsection of Section 651 entitled "Cable Systems and Open Video Systems"[10] provides that a telephone company entering the video business on any basis other than as a common carrier or radio-based provider will be regulated as *either* a cable system or OVS provider: "to the extent that a common carrier is providing video programming to its subscribers *in any manner*" (other than a radio-based or common carriage system), it is "subject to the requirements" of Title VI (unless it is an OVS system).[11]

SBC seems to believe that is can define itself as an "MVPD" subject to certain provisions of Title VI while avoiding regulation as a "cable system" under that title.[12] But this is an attempt to manufacture a new regulatory appellation out of whole cloth. Virtually every Title VI obligation (other than those that expressly apply to OVS or LECs) applies to entities that are

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[10] 47 U.S.C. § 571(a)(3).

[11] *See* Entertainment Connections, Inc, 13 FCC Rcd 14277, 14298 (1998) ("Section 651 of the Communications Act sets out four options for the provision of video programming services provided by common carriers"), aff'd sub nom City of Chicago v. FCC, 1999 F. 3d 424 (7th Cir. 1999), petitions for rehearing denied, 2000 U.S. App. LEXIS 4449 (7th Cir. 2000); *see also* Metropolitan Fiber Systems/New York, Inc., 12 FCC Rcd 3536, 3555 (1997)(Cable Service Bureau)("[T]he 1996 Act eliminated video dialtone as a common carrier offering and set out four options for video programming services provided by telephone companies").

[12] SBC ex *parte* at 14 ("[S]BC accepts that, as a MVPD, it is subject to those obligations in Title VI applicable generally to other MVPDs"). It lists as those obligations compliance with closed captioning, retransmission consent and EEO requirements. *Id.* at 13.

cable operators or providing cable service or using cable systems.[13] SBC offers a handful of examples of requirements applicable to all MVPDs, but either they are not found in Title VI or they apply only to cable operators: closed captioning mandates are found in Title VII (Section 713); retransmission consent requirements are found in Title III (Section 325); and EEO mandates in Title VI expressly apply to entities "engaged primarily in the management or operation of any cable system." Fundamentally, this is an attempt by SBC to avoid all of the obligations of Title VI while preserving a benefit available to non-cable operator MVPDs – access to vertically integrated satellite programming under Section 628. In legal parlance, this is called "having your cake and eating it too." In summary, SBC presents no evidence – nor could it – that Congress' decision in Section 651 to subject telephone companies to Title VI (if they did not choose one of the other three options) meant that they should have none of the obligations but all of the benefits of that provision.[14]

B. SBC Will Be Providing Cable Service Under Title VI

Even assuming *arguendo*, that Section 651 is at all ambiguous about the intended regulatory treatment of telcos' video service, SBC's arguments about why it cannot be regulated as a cable operator under Title VI are without merit. SBC asserts that, while it will be providing

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[13] The only Title VI requirements that apply to MVPDs generally are Section 616 (program carriage agreements) and Section 629 (competitive availability of navigation devices).

[14] The Act's treatment of OVS provides additional evidence that Congress did not intend to permit telcos to evade essentially all of the regulatory obligations in Title VI. Using the traditional tools of statutory analysis, which include examination of the statute's text, legislative history, and structure, as well as its purpose, is instructive. *See* Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (1997). For example, Section 653 was added along with Section 651 in the 1996 Act. Under Section 653, in exchange for relinquishing control over two-thirds of the activated channel capacity and taking on certain other obligations that differ from those that apply to cable operators, *see* 653(b)(1), Open Video Systems are deemed eligible for "reduced regulatory burdens" and subjected to a subset of the Title VI provisions that apply to cable operators. This construct would make no sense if Congress intended to allow the telcos to obtain much more substantial relief from cable operator regulations than was given to OVS providers without having to do any of the things required of OVS providers. SBC's approach would give it, not "the best of both worlds," but "better than the best of both worlds."

multichannel video programming service, it will not be providing "cable service"[15] to its customers. It rests this interpretation on the "switched" nature of its proposed video programming, which it alleges takes it outside the "one-way transmission" element of the cable system definition.[16] SBC also maintains that it will be providing other "applications" over the same facility that will utilize IP technology, which, it suggests, somehow immunizes its video service from cable regulation.[17] As NCTA's Legal Memorandum explained, though, "neither IP nor switching makes a difference in the regulatory character of the service."[18]

As an initial matter, SBC cannot describe what its service looks like, because it is not yet deployed, except in press releases. While SBC criticizes NCTA's memo as being "built upon supposition,"[19] it is difficult to do anything but "suppose" when SBC's own filing is replete with caveats and hedges about the nature of its service offering.[20] Under these circumstances, it is a waste of the Commission's time to address the questions raised by SBC about modifying its

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[15] "Cable service" is defined as (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

[16] SBC ex *parte* at 15.

[17] *Id.* at 20.

[18] NCTA Legal Memorandum at 13.

[19] SBC ex *parte* at 19. Without a trace of irony, SBC elsewhere asserts that "much of what cable incumbents say they are going to do seems like ephemera." *Id.* at 21.

[20] *See, e.g., id,* at 12 ("Certain of the content offering in connection with the IP-enabled video service that SBC will offer, for instance, will *likely* qualify as 'video programming'")(emphasis supplied); *Id.* at 17 ("Even though some features of IP-enabled video will have the look and feel of standard cable services..., the service predominantly is something else. SBC's service involves interactive features that go beyond those 'required' simply to access channels. It is *designed ultimately* to permit all end users to tailor much of the content and viewing experiences....")(emphasis supplied); *Id.* ("Project Lightspeed video ... *ultimately* is designed to permit end users to connect to the Internet...."); *Id.* at 19 ("*Eventually*, this interactive two-way capability will allow SBC to offer a service that will enable subscribers ... [to have] a new dimension of subscriber interaction.")(emphasis supplied).

regulatory regime to accommodate a service that it is barely able to define, let alone deploy.[21] Even if SBC's proposed service capabilities are ever deployed, nothing it has described to date takes it outside the definition of "cable service."

For example, SBC tries to make much of its plan to use a "switched" service by which a customer receives only the particular program he chooses at a given time. But that does not transform a "one-way" transmission into a two-way, wholly unregulated service, as SBC claims. In arguing that its switched system "involves regular two-way communications and interaction between individual subscribers and the network,"[22] it presents a distinction without a difference. As a practical matter, an SBC customer will not know that he is "interacting" with the SBC network when he is switching channels; surfing channels on the SBC network will be no different than surfing channels on a competing cable system. In either case, when the button for a channel change is pressed on the remote, the new channel is what will be delivered to the viewer's television set. The service the SBC customer supposedly will get appears to be the same thing that today's cable customer gets – delivery in real time of a single linear channel to a television set.

As a legal matter, this functionality fits squarely within the definition of "cable service" which has always included "subscriber interaction ... required for the selection" of video programming even if it is otherwise transmitted to subscribers on a "one-way" basis.[23] As the

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[21] *See, e.g.*, Petition of SBC Communications Inc. for Forbearance From Application of Title II Common Carrier Regulation to IP Platform Services, 20 FCC Rcd. at 9365 (refusing to rule on "hypothetical questions regarding real or imagined services").

[22] SBC *ex parte* at 16.

[23] 47 U.S.C. § 602(6)(B).

legislative history of the Cable Act makes clear, a simple menu selection from an SBC-provided line-up of linear program channels – which is all that an SBC customer would be doing by changing channels – does not remove the transmission of video programming from the definition of "cable service."[24]

This conclusion is bolstered by Congress' decision in the 1996 Act to broaden the definition of "cable service" to include interaction required to "use" as well as "select[]" video programming. The addition of "use" was intended to reflect the "evolution of cable to include interactive services such as game channels and information channels" and to make clear that subscriber interaction required for the use of "video programming" is cable service.[25] The definition of "cable service" as amended by the 1996 Act plainly encompasses the type of interactivity that SBC says its system will offer.

Commission precedent is consistent with this view. The Commission's *2002 Cable Modem Declaratory Ruling* explained that the components of an interactive *cable* service are: (1) operator control in selecting and distributing content to the subscriber and (2) availability of content to all subscribers generally.[26] SBC's hypothetical service – were it ever to be deployed – would satisfy these criteria. So far as can be gleaned from SBC's filings, it intends to negotiate programming contracts with video programming providers and to choose which programming content to make available to its customers.[27] In this respect, it is no different than any other cable operator who selects the array of video services to offer its customers. And SBC's customers

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[24] H. Rep. No. 98-934, 98th Cong. 2d Sess. 43 (1984).

[25] H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 169 (1996).

[26] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4836 (2002).

[27] *See, e.g.*, SBC Comments, MB Docket No. 05-255 at 19-20 ("SBC is currently in the midst of negotiations – and hopes it will be able to enter into commercial arrangements – for access to programming.").

will be no different than any other cable customers in choosing from that video programming lineup though interaction with the system.

SBC admits that, as to its video product, "some features of IP-enabled video will have the *look and feel of standard cable services*..."[28] But it argues that some services that it may "eventually" or "ultimately" make available to subscribers will transform its offering into predominantly something other than traditional cable service.[29] And SBC says that "ultimately" its service might permit "end users to tailor much of the content and viewing experiences, or engage in transactions."[30] Were that day ever to arrive, perhaps SBC would have some basis to ask the Commission to consider whether its service is something other than cable service. But for now, things that "eventually" or "ultimately" might happen are no basis for Commission action.

SBC concedes that "all programming arrangements and service components will... be a function of arrangements with content owners and applicable copyright protections."[31] SBC also describes various possible interactive uses of its system – such as selecting different camera angles, requesting additional information while watching a television show, using enhanced picture-in-picture, or using interactive "triggers."[32] There is nothing inherently transformative, or especially innovative, about these types of services, which have been in development for years[33] and which have never been viewed as inconsistent with the definition of "cable service."[34]

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[28] SBC ex *parte* at 17 (emphasis supplied).

[29] *Id.* (*citing Cable Modem Declaratory Ruling* at ¶68).

[30] *Id.*

[31] *Id.* at 20 n.52.

[32] *Id.* at 20.

[33] For example, Cablevision currently offers many of these features. *See* http://www.io.tv/index.jhtml?pageType=enhanced_tv (describing some of the interactive features offered over

SBC also argues that "voice, video and data will be offered over a converged IP-Enabled network,"[35] and suggests that the use of IP-enabled video somehow warrants different treatment than any other video programming. But SBC's potential incorporation of IP technology into its system architecture, and its bundling video with other products, does not alter the regulatory treatment of the underlying video programming service.[36]

Both the Communications Act and FCC precedent express a strong preference for technology-neutral approaches to regulatory decisions.[37] Verizon agrees with this view as well. *See* Verizon Comments, MB Docket No. 05-255, at 28 (Sept. 19, 2005) (stating that "the fact that a service is or is not IP-based has little bearing" on whether it is subject to franchising requirements under the Communications Act).

Cablevision's network, including multiple camera angles selected by the subscriber and ability to request information about content and engage in transactions).

[34] *See e.g.*, Application for Consent to Transfer Control of Licenses from Comcast Corp. and AT&T Corp., 17 FCC Rcd. 23246 at ¶ 18 (2002) (describing Comcast's interactive television experiments); Non-discrimination in the Distribution of Interactive Television Services Over Cable, 16 FCC Rcd. 1321 (2001) (Notice of Inquiry on Interactive Television Services).

[35] SBC e*x parte* at 20.

[36] SBC attempts to blur the difference between Internet-based video providers, like Akimbo and MovieLink, and its own facilities-based, wireline video services and claims NCTA's argument would lead to web-based video services being regulated under Title VI. *Id.* at 21-22. But NCTA never made such an argument. We merely noted in passing that, from a customer's perspective, the *content* provided by those web-based services is similar to the content delivered by cable systems. NCTA Legal Memorandum at 8. SBC will not be offering an Internet-based video service, nor, as far as has been disclosed, will its video service touch the public Internet. Rather, it will be using a wired network using public rights-of-way, and apparently, intends to use IP merely as a transmission method to distribute video over its proprietary network.

[37] The most recent example of the Commission's commitment to "treating like services alike" and not to discriminate on the basis of technology appears in the *Wireline Broadband Order*. There, the Commission spoke of "regulating like services in a similar functional manner," and "seeking to create a regime that is technology and competitively neutral." It also emphasized the need to focus on "the nature of the service being offered to consumers," not "the type of facilities used," and how "regulat[ing] like services in a similar manner" promotes market-based investment decisions, not ones driven by regulatory disparities. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, released September 23, 2005, at ¶¶ 1, 3, 16 n.44, & 45.

Moreover, what SBC appears to be describing is far from a fully integrated offering. It seems likely that SBC will offer subscribers a choice of voice, wireline telephone, data, and wireless services in combination or on a standalone basis. Consequently, a subscriber that only takes SBC's basic video offering will not have access to any of the voice and data applications SBC describes. The likelihood of such a result for a substantial number of SBC's customers reinforces rather than mitigates the applicability of the regulatory regime carefully established by Congress. So the presumed "integration" of services to be offered by SBC does not change the fundamental fact that it is offering cable service as one of its services.

Finally, whatever the regulatory status of SBC's proposed interactive features may be, the additions of these drawing board bells and whistles to its video offerings cannot change the fact that SBC in the main will still be providing linear video programming channels to subscribers, just as cable operators do today. Nothing about the interactive applications that SBC described can justify reading out of the Cable Act the requirements to obtain a franchise, comply with the must-carry laws, and adhere to the other requirements that apply to any other cable operator who provides multiple channels of video programming to customers.[38]

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[38] SBC also tries to find support for its position in the FCC's *Vonage Order*, 19 FCC Rcd. 22404 (2005). SBC *ex parte* at 18-19. But its reliance is misplaced. The *Vonage Order* addressed jurisdiction over IP *voice* services (and only a limited subset of those), not all IP-enabled services. The FCC's passing reference to "even video" in that decision (*Vonage Order*, 19 FCC Rcd. at 22424) was in the context of reference to *ancillary* video features of Vonage-like services (*e.g.*, video e-mail or video conferencing). There is no support for SBC's broader reading of the Order (SBC *ex parte* at 18) as preempting state regulation of "*any* other IP-enabled service" with particular characteristics. *See also* NCTA Legal Memorandum at 24-26.

C. SBC Will Be Providing Cable Service Over a Cable System

In addition to arguing that it is not providing "cable service," SBC asserts that it will not be distributing its video programming over a "cable system."[39] Among other things, it claims that its facility falls outside the definition of a "cable system" because it allegedly fits within the exemption applicable to common carrier facilities used to transmit video programming "*solely to provide interactive on-demand services.*" Importantly, the statute defines "interactive on-demand services" to mean "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, *but does not include services providing video programming prescheduled by the programming provider.*"[40] SBC cannot shoehorn its cable services into this exemption.

First, SBC does not even pretend to demonstrate that its facilities will provide *solely* interactive on-demand services.[41] It concedes that its ability to offer "interactive on-demand" services will depend on its contractual arrangements with programming providers, but it does not suggest that the programming will in fact be any different than what is offered by traditional franchised cable operators.[42] And if SBC intends to retransmit the signal of any television broadcast station pursuant to the copyright compulsory license, that programming is clearly prescheduled by the broadcaster, not SBC. Indeed, SBC would lose the compulsory license if it

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[39] SBC ex *parte* at 23.

[40] 47 U.S.C. § 522(12) (emphasis supplied).

[41] SBC apparently takes the view that *all* of its video programming services qualify as "interactive on-demand services" since all channels will be delivered on a switched basis – *i.e.*, only when subscribers ask the network for them. This is a strained reading of the statute. Since all channels in a switched environment are delivered to subscribers in this fashion, it seems unlikely Congress would have added the phrase "on an on-demand, point-to-point basis" unless it meant to distinguish between different types of programming. The most logical reading of the statute – and one that is consistent with industry practice – is that the statutory provision was distinguishing between on-demand and linear programming. Since SBC will be offering linear programming and not solely on-demand content, this exemption is inapplicable to its core video programming service.

[42] SBC ex *parte* at 24-25 and note 70.

did *not* transmit this programming on the schedule constructed by the broadcaster.[43] *All* linear programming channels are, by definition, "prescheduled" by the programmer (that is, if the viewer tunes to the local CBS affiliate at 7 p.m. on Sundays, she will receive *60 Minutes*). SBC cannot reconcile its intention to carry linear broadcast and cable networks, all of whose programming is prescheduled by the program provider, with its assertion that it offers only "interactive on-demand" services.

As a last resort, SBC claims that all that matters for regulatory purposes is its system architecture.[44] But, the Act contains no suggestion that the provisions of Title VI that apply to a telephone company magically fall away based on some other theoretical technical capabilities of its cable system. The focus on the exception to the definition of a cable system is whether "the facility *is used* in the transmission of video programming directly to subscribers"[45] and not on whether it *can* be used for something else that is not being provided to customers.

CONCLUSION

For the foregoing reasons and for the reasons explained in NCTA's July 29, 2005 Legal Memorandum, what SBC describes as its proposed video service will be a "cable service" provided over a "cable system" by a "cable operator." Just like all other cable operators, SBC is subject to requirements such as franchising, mandatory carriage, and the host of social obligations contained in Title VI. To the extent that SBC wishes to avoid those requirements, Congress has given it other explicit alternatives: common carriage, OVS and wireless. SBC's

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[43] 17 U.S.C. § 111. To qualify, a cable system must simultaneously retransmit the programming transmitted by a broadcast station. *Id.*, § 111(f).

[44] SBC ex *parte* at 25 and note 70.

[45] 47 U.S.C. § 522 (7)(c).

tortured effort to wring a new regulatory category out of the Act simply will not withstand scrutiny.

If Congress determines there is a need to revisit Title VI to take account of growing competition, it can do so. And if it does so, we believe a comprehensive review of the entire regulatory regime – as it applies to existing operators, overbuilders, and phone companies – is in order. What is out of order is SBC's effort to make the Commission complicit in its efforts to undermine the intent of Congress.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Neal M. Goldberg
Diane B. Burstein

Counsel for The National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

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